(2)

No. 04-1024

IN THE

Supreme Court of the United States

MARY CHRISTINE O'CONNOR,

Petitioner,

v.

CHURCH OF ST. IGNATIUS LOYOLA and
REV. WALTER MODRYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT, STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the ministerial exception to claims for employment discrimination protect a religious organization from liability for its employment decision where the decision was not rooted in religious belief or doctrine?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Church of St. Ignatius Loyola is not a corporation, has no stock and does not have a parent corporation.

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STATEMENT OF THE CASE

A. Procedural History Of The Case[1] And The Nature of Petitioner O'Connor's Claims For Pregnancy-Based Sex and Disability Discrimination Under The New York City Human Rights Law, New York City Charter and Administrative Code, Title VIII, § 8-107 *et seq.*

On or about October 12, 2001, Petitioner Mary Christine O'Connor (hereinafter "Petitioner O'Connor") commenced a New York State court action by filing a Verified Complaint with the Supreme Court of the State of New York, County of New York (hereinafter "New York Supreme Court"). Petitioner O'Connor's Verified Complaint asserted causes of action against Respondents Church of St. Ignatius Loyola and Rev. Walter Modrys under the New York City Human Rights Law, New York City Charter and Administrative Code, Title VIII, § 8-107 *et seq.* (hereinafter "NYCHRL")[2] for

[1] Respondents provide this procedural history because Petitioner O'Connor has not adequately complied with Rule 14(1)(g) of the Supreme Court of the United States, which provides in pertinent part that a petition for certiorari seeking a review of a state court judgment shall contain: (1) "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised;" and (2) "the method or manner of raising them and the way in which they were passed on by those courts . . . so as to show that the federal question was timely and properly raised and that this court has jurisdiction to review the judgment on a writ of certiorari." Rule 14(1)(g).

[2] Despite repeated references to "Title VII" in her Petition For Writ Of Certiorari, Petitioner O'Connor has never brought any civil action against Respondents pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

pregnancy-based sex discrimination and pregnancy-based disability discrimination. The alleged discriminatory employment decisions set forth in Verified Complaint include: (1) Respondent Modrys' decision to remove Petitioner O'Connor of her job title and job responsibilities as Chaplain, and (2) Respondent Modrys' decision to remove Plaintiff from her office on the second floor of the rectory and give it to a new full-time priest at the parish. Plaintiff also alleges she was constructively discharged as a result of such alleged discriminatory employment decisions.

On or about December 14, 2001, Respondents filed their Answer to Petitioner O'Connor's Verified Complaint, denying the material allegations in the Verified Complaint and asserting various affirmative defenses.

On or about April 29, 2003, Respondents moved the New York Supreme Court for an Order pursuant to Rule 3212 of the New York Civil Practice Law and Rules granting summary judgment and dismissing the Verified Complaint in its entirety. In their motion, Respondents argued that: (1) the court lacked subject matter jurisdiction over Petitioner O'Connor's causes of action pursuant to the ministerial exception of the Free Exercise and Establishment Clauses of the First Amendment of the U.S. Constitution and Article One, Section Three of the New York State Constitution; (2) Plaintiff's allegations of alleged unlawful activity occurring prior to May 10, 1998 were time-barred pursuant to the three-year limitations period established by Section 8-502(d) of the NYCHRL; and (3) Plaintiff could not establish a *prima facie* case of alleged pregnancy-based sex and disability discrimination as a matter of law.

On or about May 12, 2003, Petitioner O'Connor filed a Memorandum Of Law In Opposition To Defendants' Motion For Summary Judgment (hereinafter "Opposition Memorandum"). In her Opposition Memorandum, Petitioner O'Connor argued that the ministerial exception did not apply to her claims of discrimination because "her position, for the most part, was administrative." However, Petitioner O'Connor did not cite in her Opposition Memorandum to the Ninth's Circuit decision in *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999) or to any of the other cases she has cited in support of her Petition For Writ Of Certiorari.

By Decision and Order dated July 16, 2003, the New York Supreme Court granted the Respondents' motion and dismissed the Verified Complaint in its entirety. (The Decision and Order is reprinted in Petitioner O'Connor's Appendix [hereinafter "Pet. App."] at A-1 to A-2.) The New York Supreme Court determined that the ministerial exception deprived the court of jurisdiction over Petitioner O'Connor's demotion and discharge claims, *but also found that Appellant's allegations were "insufficient to establish a prima facie case of discrimination.*" In addition, the court ruled that Petitioner O'Connor's allegations occurring prior to May 10, 1998 were time-barred by the three-year statute of limitations set forth in NYCHRL § 8-502(d). (Pet. App. at A-2). Pursuant to this ruling, a number of allegations made by Petitioner O'Connor in her Verified Complaint were found to be time-barred, including: (1) that in June 1996 a member of the Church's congregation called Petitioner O'Connor a "barren bitch," and Respondent Modrys replied that the person was "only half right;" and (2) that in December 1996, Plaintiff received a $100 Christmas gift from Respondent Church of St. Ignatius Loyola, as

compared to the $200 Christmas gift she had received prior to her pregnancy, and that Father Modrys told Petitioner O'Connor that "the Church had done enough for her." Accordingly, Respondents object to Petitioner O'Connor's citation to these time-barred allegations on pg. 3 of her Petition For Writ Of Certiorari.[3]

On or about August 4, 2003, Petitioner O'Connor filed a Notice of Appeal with New York State's intermediate appellate court – the Supreme Court of the State of New York, Appellate Division, First Department (hereinafter "Appellate Division"). In Petitioner O'Connor's Reply Brief to the Appellate Division, Petitioner O'Connor argued that the ministerial exception did not apply in this case because "the true nature of Mrs. O'Connor's position was administrative and organizational." Petitioner O'Connor also argued that the ministerial exception did not apply since "there is absolutely nothing in this case that relates to issues of interpretation or application or religious or Canon Law." No further arguments were advanced by Petitioner O'Connor in support of her contention that the ministerial exception did not apply to her claims. Once again, Petitioner O'Connor did not cite to *Bollard* or any of the other cases she has relied upon in support of her Petition For Writ Of Certiorari.

After submission of briefs and oral argument by counsel for all parties, the Appellate Division unanimously affirmed the New York Supreme Court's July 16, 2003 Decision and Order dismissing Petitioner O'Connor's Verified Complaint.

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[3] Petitioner O'Connor has not asked this Court to review the New York State Supreme Court's holdings that: (1) her allegations were insufficient to establish a *prima facie* case of discrimination; or (2) that her allegations occurring prior to May 10, 1998 were time-barred.

In its June 17, 2004 Decision and Order, the Appellate Division held that the New York Supreme Court properly determined that it lacked subject matter jurisdiction over Petitioner O'Connor's causes of action pursuant to the ministerial exception of the Free Exercise Clause of the First Amendment. *See O'Connor v. Church of St. Ignatius Loyola*, 779 N.Y.S.2d 31 (1st Dep't 2004) (reprinted at Pet. App. at A-3 to A-4).

On or about July 16, 2004, Petitioner O'Connor filed a Motion For Leave To Appeal with the New York State Court Of Appeals. The question presented by Petitioner O'Connor's motion was "[d]oes the ministerial exception apply, where an employee alleges unlawful discrimination by a religious institution, where such alleged discriminatory conduct is not rooted in religious belief or conduct." No other issue was presented by Petitioner O'Connor to the New York State Court of Appeals for consideration. Once again, Petitioner O'Connor did not cite to *Bollard* or any of the cases she has cited in her Petition For Writ of Certiorari.

By letter to the Clerk of the New York Court of Appeals dated August 6, 2004, Petitioner cited to *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), a case which was decided after Petitioner O'Connor filed her motion for leave to appeal. Petitioner O'Connor stated in the letter that the case was relevant to "whether courts of the State of New York have jurisdiction over the claims of discrimination and harassment, asserted by [Petitioner O'Connor], a *non-ordained and secular employee*, against her employer, Church of St, Ignatius Loyola." (Emphasis in original). Petitioner O'Connor cited no other basis for her contention that *Elvig* was relevant to her claims.

On October 19, 2004, the New York State Court of Appeals denied Petitioner O'Connor's motion for leave to appeal. (Pet. App. at A-5). Significantly, the New York State Court of Appeals did not affirm or otherwise render any opinion on the merits of the Appellate Division's June 17, 2004 Decision And Order affirming New York Supreme Court's July 16, 2003 Decision And Order granting Respondents' motion for summary judgment.

B. The Spiritual And Pastoral Nature Of Petitioner O'Connor's Job Duties As A Chaplain, Cantor and Pastoral Associate For Respondent Church Of St. Ignatius Loyola.

In her Petition For Writ Of Certiorari at page 2, Petitioner O'Connor states that her "memorandum of law in opposition to defendants' motion for summary judgment pointed to the secular and administrative nature of Plaintiff's job." It is unclear whether Petitioner O'Connor still considers the nature of her job duties as relevant to the question presented in her Petition For Writ Of Certiorari. For the purpose of clarifying the record, Respondent notes that the Appellate Division found that "Plaintiff was a pastoral associate and chaplain whose primary function served the spiritual and pastoral mission of the church." (Pet. App. at A-3). This finding was supported by Respondents' detailed submissions to both the New York Supreme Court and the Appellate Division summarizing Petitioner O'Connor's own deposition testimony, which overwhelmingly established the spiritual and pastoral nature of her positions as Chaplain, Cantor and Pastoral Associate.[4]

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[4] For example, with respect to her Cantor responsibilities, Petitioner O'Connor testified that "being the Cantor is more than

(Cont'd)

To the extent Petitioner O'Connor asks this Court to review the Appellate Division's findings of fact concerning the spiritual and pastoral nature of Petitioner O'Connor's job duties, the Petition should be denied. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue."); *see also* Rule 10 of the Supreme Court of the United States ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

(Cont'd)

being a singer in my position, as a pastoral person. It is a very important presence. I was the only woman on the altar at that time." In addition, Petitioner O'Connor testified that during her employment with Respondent Church of St. Ignatius Loyola, her duties as Pastoral Associate, Cantor and School Chaplain focused on spiritual development and oversight of liturgical programs including: (1) serving as a liaison with the school, leading the music and coordinating the entire service with volunteers for lectors, readers and Eucharistic Ministers for the 7:30 mass; (2) developing and leading a prayer group, women's ministry and a liturgical program for the parochial school; (3) developing monthly liturgies, prayer services, Bible study, devotions and retreats for the school faculty; (4) developing and leading the retreat ministry, in which she coordinated two retreats away from the parish a year for the parishioners, and where her duties included spiritual direction programs and prayers at the retreats; (5) serving as the Master of Ceremonies and Cantor at liturgical services and main parish events during Holy Week; (6) serving as Eucharistic minister *and occasionally as a preacher giving homilies at the parish masses*; and (7) developing an arts ministry and writing bulletin articles, including for example, a series on different prayer experiences for people.

REASONS FOR DENYING THE PETITION

I. THE INSTANT CASE DOES NOT PRESENT COMPELLING REASONS FOR REVIEW ON A WRIT OF CERTIORARI.

In support of her Petition For Writ Of Certiorari, Petitioner O'Connor relies on Rule 10(b) of the Supreme Court of the United States, which states that one factor the Court may consider in determining whether compelling reasons exist for review on a writ of certiorari is whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of .. . a United States court of appeals." Rule 10(b). As set forth below, the Petition For Writ Of Certiorari should be denied because: (1) the federal circuit courts that have considered the question presented by Petitioner O'Connor, including the Ninth Circuit, have answered the question in the affirmative, and therefore there exists no conflict between a decision of a state court of last resort and a United States court of appeals; (2) the Ninth Circuit's narrow exception to the ministerial exception in claims of sexual harassment not involving employment decision-making are inapplicable to Petitioner O'Connor's claims for pregnancy-based sex and disability discrimination, and Petitioner O'Conner has waived any argument that it is applicable; (3) New York State's highest court has not addressed the application of the ministerial exception to claims arising under the New York City Charter and Administrative Code, Title VIII, § 8-107 *et seq.*, and (4) an independent and adequate state law basis exists for the New York State Supreme Court's dismissal of Petitioner O'Connor's Verified Complaint.

A. The Federal Circuit Courts That Have Addressed The Question Presented By Petitioner O'Connor, Including The Ninth Circuit, Have Held That The Ministerial Exception Bars Judicial Inquiry Into *Employment Decisions* Made By A Religious Organization Regarding A Minister, Regardless Of Whether The Decision Is Motivated By Religious Belief Or Doctrine.

Petitioner O'Connor has asked this Court to consider a single question: "[s]hould the ministerial exception to claims for employment discrimination protect a religious organization from liability for its own employment decision where the decision was not rooted in religious belief or doctrine." (Pet. at i). In arguing that the answer to this question is no, Petitioner O'Connor relies solely on the Ninth Circuit's decisions in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), *reh'g en banc denied*, 397 F.3d 790 (9th Cir. 2005), and *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999). Petitioner O'Connor's citation to *Elvig* and *Bollard* is misplaced since these cases uphold the widely accepted principal that a church's employment decisions concerning its ministers are protected by the Free Exercise Clause of the First Amendment of United States Constitution (hereinafter "Free Exercise Clause"), *regardless of whether the decision at issue is based upon religious belief or doctrine.* Accordingly, the Petition For Writ Of Certiorari should be denied since no conflict exists between a decision of a state court of last resort and a United States court of appeals.

The Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere

with a church's governance of its own affairs.[5] *See, e.g., Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (explaining that the Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government *as well as those* of faith and doctrine.") (emphasis added); *see also Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether and whether the candidate possesses them"). The right of a religious organization to be free from state inference with church *governance* is separate from the First Amendment's prohibition of state adjudication of questions of religious faith and doctrine. *See Kedroff*, 344 U.S. at 116; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999). Accordingly, the Free Exercise Clause restricts *both* government encroachment on religious beliefs *and* government encroachment on the ability of a church to manage its own affairs.

To assure this constitutional prohibition of government interference in matters of church governance, federal courts have developed the ministerial exception to employment discrimination claims. The ministerial exception prohibits judicial interference into the employment relationship between religious organizations and their "ministers," with the term ministers being broadly defined to include all employees of a religious institution, whether ordained or not,

[5] The First Amendment of the United States Constitution states in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. Const. amend I.

whose primary functions serve the spiritual and pastoral mission of the church. *See Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (dismissing gender discrimination claim *by non-ordained pastoral associate* since the "ministerial exception to Title VII . . . does not depend on ordination but upon the function of the position"). The ministerial exception covers not only the initial selection of the minister, *but all other employment decisions such as the minister's salary, place of assignment and the duties he or she is to perform. See McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

Petitioner's citation to both *Bollard* and *Elvig* for the proposition that the ministerial exception does not apply to employment decisions unless they are based in religious belief or doctrine is misplaced. In *Bollard*, the Ninth Circuit considered whether the ministerial exception barred a claim for sexual harassment under Title VII brought by a novitiate in the Society of Jesus. In holding courts must "simply defer without further inquiry" into the defendant's employment decisions concerning a minister, the Ninth Circuit cited with approval to the Fifth Circuit's decision in *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999), stating:

> [W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church.

Bollard, 196 F.3d at 946-47, (citing *Combs*, 173 F.3d at 350). Critically, the Ninth Circuit also stated that "the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause *simply to require the church to articulate a religious justification for its personnel decisions*." 196 F.3d at 946 (emphasis added).

Similarly, in *Elvig* the Ninth Circuit considered whether the ministerial exception barred a Title VII sexual harassment suit brought by a former Associate Pastor of the Calvin Presbyterian Church. *Elvig*, 375 F.3d at 953. The court held that the plaintiff's allegations concerning the church's employment decisions, including the actions of removing certain of plaintiff's duties, suspending her, terminating her employment and refusing to permit her to circulate a resume, *were all barred* from judicial consideration because the ministerial exception protected the defendants' "unfettered freedom to take those actions without incurring Title VII liability." *Elvig*, 374 F.3d at 961, (citing *Bollard*, 196 F.3d at 947) ("Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church."). As in *Bollard*, the Ninth Circuit in *Elvig* held that it would not inquire into whether the reason for the employment action at issue was based religious doctrine. *Id.* at 961-62. After the *Elvig* decision, the Ninth Circuit reiterated this holding in *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1101-04 (9th Cir. 2005) (affirming dismissal of a disability discrimination claim pursuant to the ministerial exception, where a pastor of the United Methodist church claimed he

was forced to resign and that a hostile work environment was created when the church failed to make reasonable accommodations for his disabilities).

Like the Ninth Circuit in *Elvig* and *Bollard*, other courts have consistently held that the ministerial exception bars judicial inquiry into employment decisions between a church and its ministers, *without regard to whether the alleged discriminatory decision at issue is based on religious belief or doctrine. Combs*, 173 F.3d at 350 (5th Cir. 1999) (holding employment discrimination claims by ministers against their church necessarily require "secular authorities [to] intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal"); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (in rejecting Title VII claim by a non-ordained pastoral associate pursuant to the ministerial exception, the Court held that "the free exercise clause protects the act of a decision rather than the motivation behind it" . . . "the state may no more require a minimal basis in doctrinal reasoning than it may supervise doctrinal content."); *EEOC v. The Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795, 801 (4th Cir. 2000) (holding the ministerial "exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision."); *Alicea-Hernandez v. The Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2002) (in applying the ministerial exception, the court held that "[i]t is *not* our role to determine whether the church had a secular or religious reason for the alleged mistreatment of Alicea-Hernandez. The only question is that of the appropriate characterization of her position.") (emphasis added); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63

(8th Cir. 1991); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000); *EEOC v. Catholic University of America*, 83 F.3d 455, 457-59 (D.C. Cir. 1996) (finding the University's failure to "assert any religious basis for denying Sister McDonough tenure does not affect our conclusion; nor does the fact that her application never reached ecclesiastical levels of review. The focus under the ministerial exception is on the action taken, not possible motives."); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989).

Since the federal circuit courts, including the Ninth Circuit, have overwhelmingly and consistently answered the question posed by Petitioner O'Connor in the affirmative, Respondents respectfully request that the Petition For Writ Of Certiorari be denied in its entirety.

B. The Narrow Holdings Of *Bollard* and *Elvig* Concerning The Inapplicability Of The Ministerial Exception To Title VII Sexual Harassment Claims Not Involving Employment Decisions Are Inapplicable To Petitioner O'Connor's Claims For Pregnancy-Based Sex And Disability Discrimination Under The NYCHRL.

As set forth above, the Ninth Circuit in *Bollard* and *Elvig* affirmed the principle that the ministerial exception prohibits courts from analyzing Title VII discrimination and harassment claims involving employment decisions rendered by a church, regardless of whether the decision was based on religious doctrine. At the same time, these cases also created a narrow exception to the application of the ministerial exception to Title VII sexual harassment claims

premised on allegations which are unrelated to employment decision-making. *See e.g. Bollard*, 196 F.3d at 947 (creating exception to ministerial exception for Title VII sexual harassment claim where plaintiff did not complain "that the Jesuits refused to ordain him or *engaged in any other adverse employment action*" such as the determination of his salary, his place of assignment, and the duties he was to perform). As set forth in detail below, Petitioner O'Connor cannot avail herself of this narrow exception since: (1) she has waived the argument, and (2) the exception does not apply to her claims for pregnancy-based sex and disability discrimination, which are premised on allegations of concerning employment decisions by Respondents that are protected by the ministerial exception.

1. Petitioner O'Connor Failed To Raise The Issue Of The *Bollard* and *Elvig* Exception To The New York State Courts Below.

It is well established that this Court has no jurisdiction to exercise its appellate power over state court judgments unless a federal question has been raised, presented and pursued in a timely manner at appropriate points in the state court proceedings. *See Godchaux Co. v. Estophinal*, 251 U.S. 179, 181 (1919). As set forth in Section A of the Statement Of The Case above, Petitioner O'Connor's arguments to the New York State courts that the ministerial exception does not apply to her claims in this action were based solely on her contentions that: (1) her job duties were primarily administrative and secular in nature, and (2) the ministerial exception does not apply to employment decisions that are not based on religious belief or doctrine. Petitioner has also failed to raise the *Bollard* and *Elvig* exception in her question presented to this court – "[s]hould the ministerial exception

to claims for employment discrimination protect a religious organization from liability for its own *employment decision* where the *decision* was not rooted in religious belief or doctrine." (emphasis added).

In sum, Petitioner O'Connor did not argue below that the narrow exception created by the Ninth Circuit in *Bollard* and *Elvig* to the ministerial exception is applicable to her claims for pregnancy-based sex and disability discrimination. Accordingly, Petitioner O'Connor has waived her right to raise this issue in connection with the instant Petition.

2. The Narrow Bollard and Elvig Exception To The Ministerial Exception Does Not Apply To Petitioner O'Connor's Pregnancy-Based Sex And Disability Claims Under The NYCHRL.

Assuming *arguendo* that Petitioner did raise the issue of the *Bollard* and *Elviq* exception below, the exception does not apply to Petitioner O'Connor's claims for pregnancy-based sex and disability discrimination under the NYCHRL. These city law discrimination claims are based on the following allegedly discriminatory *employment decisions*: (1) Respondent Modrys' decision to remove Petitioner O'Connor of her job title and job responsibilities as Chaplain, and Respondent Modrys' alleged statement to Petitioner O'Connor that he did not think she could do her job with two children; and (2) Respondent Modrys' decision to remove Petitioner O'Connor from her office on the second floor of the rectory and give it to a new full-time priest at the parish. These allegations constitute purportedly discriminatory employment decisions by Respondents that both *Bollard* and *Elvig* recognized are protected by the ministerial exception.

C. The New York State Court Of Appeals Has Not Addressed The Application Of The Ministerial Exception To Claims Arising Under The NYCHRL.

As noted in the Section A of the Statement Of The Case *supra*, the New York State Court Of Appeals denied Petitioner's motion for leave to appeal in this case. It did not affirm or otherwise render an any opinion concerning the merits of the Appellate Division's June 17, 2004 Decision And Order, nor has it rendered any opinion concerning application of the ministerial exception of which Respondents are aware.

Respondents recognize that this Court may grant a petition for a writ of certiorari when a state court of last resort has denied leave to appeal the decision of an intermediate state court. However, it is well established under New York law that "the denial of a motion for leave to appeal is not the equivalent of an affirmance and has no precedential value." *Matter of Conservative Party of the State of New York v. New York State Board of Elections*, 88 N.Y.2d 998, 648 N.Y.S.2d 868 (1996); *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 297-98 (1929) (Cardozo, Ch. J.). Accordingly, the question presented by Petitioner O'Connor in her Petition For Writ Of Certiorari has yet to be addressed by New York State's highest court, and therefore does not warrant this Court's attention at this time.

D. An Independent And Adequate State Law Basis Exists For Dismissing Petitioner O'Connor's Verified Complaint.

In dismissing Petitioner O'Connor's Verified Complaint in its entirety, the New York Supreme Court not only determined that the ministerial exception deprived the court of jurisdiction over Petitioner O'Connor's demotion and discharge claims, but also found that her allegations were insufficient to establish a *prima facie* case of discrimination as a matter of law, and that her allegations prior to May 10, 1998 were time-barred. (Pet. App. at A-2). Accordingly, since an independent and adequate state law basis exists for dismissing Petitioner's Verified Complaint, this Court should deny the Petition For Writ Of Certiorari. *See Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.").

CONCLUSION

For all the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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